

No. PD-1042-18

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

RECEIVED
COURT OF CRIMINAL APPEALS
2/28/2019
DEANA WILLIAMSON, CLERK

RUBEN LEE ALLEN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Harris County
No. 01-16-00768-CR

* * * * *

**STATE PROSECUTING ATTORNEY'S
AMICUS BRIEF**

* * * * *

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* * * * *

**STATE PROSECUTING ATTORNEY'S
AMICUS BRIEF¹**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney submits this amicus brief in support of the Harris County District Attorney's request to overrule *Ex parte Carson*, 159 S.W.2d 126 (Tex. Crim. App. 1942), *Peraza v. State*, 467 S.W.3d 508 (Tex. Crim. App.

¹ As the State Prosecuting Attorney, there is no fee attached to this filing. TEX. R. APP. P. 11.

2015), and *Salinas v. State*, 523 S.W.3d 103 (Tex. Crim. App. 2017). To say, as this Court has, that the inquiry into the legitimacy of a court cost or fee is determined by the statute's text, as opposed to whether the funds are actually used for a criminal justice purpose, begs the following: how is something a tax when indisputable evidence proves that those funds are actually used for a criminal justice purpose? *See Salinas*, 523 S.W.3d at 107. Costs and fees can only truly be a tax if no criminal justice purpose is actually served. As demonstrated below, direction at the time of collection and spending after collection is a false distinction. *Id.* at 109 n.26. Spending after collection actually verifies the existence of direction to a criminal justice purpose at the time of collection.

Upon closer examination of the court cost and fee controversy, it has become apparent that the Court's holdings in *Ex parte Carson*, *Peraza*, and *Salinas* encroach on power assigned elsewhere and therefore violate separation of powers. The striking down of statutory criminal court costs and fees infringes on the Legislature's constitutional authority to establish uniform costs and fees and enact the State's budget. *See* TEX. CONST. Art. III, §§ 46, 49a(b). It also interferes with the Governor's exclusive role as the chief budget officer and his authority to alter the budget. *See* TEX. GOV'T CODE §§ 317.002-003 (Governor's ability to make proposals concerning appropriated funds), 401.041 ("The governor is the chief budget officer

of the state.”).

1. The Legislature has the Power to Establish Uniform Court Costs and Fees.

The Legislature has the exclusive power to set uniform court costs and fees. TEX. CONST. Art. III, § 46.² Chapter 102 of the Government Code and Chapter 133 of the Local Government Code are a valid exercise of that authority.³ TEX. GOV’T CODE §§ 102.021-142 (court costs in criminal cases); TEX. LOCAL GOV’T CODE § 133.001 (purpose for Chapter is to consolidate and standardize fees in criminal matters). Courts are “not empowered to substitute what [they] believe is right or fair for what the Legislature has written, even if the statute seems unwise or unfair.”

² Section 46 states, in part:

(a) In this section, “fee” means a fee in a criminal or civil matter all or a portion of which is required to be collected by local officers, clerks, or other local personnel and remitted to the comptroller of public accounts for deposit in the manner provided for in the law imposing the fee.

(b) This section applies only if the legislature enacts by law a program to consolidate and standardize the collection, deposit, reporting, and remitting of fees.

(c) A fee imposed by the legislature after the enactment of the program described by Subsection (b) of this section is valid only if the requirements relating to its collection, deposit, reporting, and remitting conform to the program.

³ In 2014, according to the Office of Court Administration’s (OCA) “Study of the Necessity of Certain Court Costs and Fees in Texas,” there were seventeen categories of costs and fees imposed by the Legislature in criminal cases. OCA, “Study of the Necessity of Certain Court Costs and Fees in Texas,” at Attachment B, Table of Criminal Court Costs, *available at* <http://www.txcourts.gov/media/495634/SB1908-Report-FINAL.pdf>.

Vandyke v. State, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017). Therefore, Texas courts are compelled to presume that the Legislature determined that the statutory costs and fees are necessary for the effective operation and administration of the criminal justice system. *See Rodriguez v. State*, 93 S.W.3d 60, 69 (Tex. Crim. App. 2002) (“Whenever we are confronted with an attack upon the constitutionality of a statute, we presume that the statute is valid and that the Legislature has not acted unreasonably or arbitrarily.”) (citing *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978)).

Laws are not enacted out of thin air. They are steeped in timely fact and policy. *See State v. Rhine*, 297 S.W.3d 301, 305-06 (Tex. Crim. App. 2009) (“The legislature also declares the public policy of the state and may depart from established public policy, reshape it, or reform it.”). And the process through which laws are enacted is scrupulously organized. Within the Legislature, there are numerous committees that cover every area of governance and affairs involving Texas.⁴ Those committees are directed to “study any matter within its jurisdiction and of the instrumentalities of government administering or executing the matter” and to “conduct investigations

⁴ The Senate Committees are listed at <https://capitol.texas.gov/Committees/CommitteesMbrs.aspx?Chamber=S>. And the House Committees are listed at <https://capitol.texas.gov/Committees/CommitteesMbrs.aspx?Chamber=H>.

to collect adequate information and materials necessary.”⁵ TEX. GOV’T CODE § 301.014(a). These committees are the fact-gatherers, and any resulting legislation has been informed by the evidence they have formally vetted and considered and then relayed to the full Senate and House. *See Vandyke*, 538 S.W.3d at 569 (courts should defer to the policy determinations of the law-making body); *cf. Manzi v. State*, 88 S.W.3d 240, 244 (Tex. Crim. App. 2002) (deference is given to the factfinder).

Reframing the court cost and fee dispute through this lens shows that a judicial taxation reclassification is improper. Consider, for example, the “Comprehensive Rehabilitation” fee struck down in *Salinas*. 523 S.W.3d at 106-09. Instead of focusing on the fact that the rehabilitation services were not limited to crime victims, *id.* at 108, this Court should have deferred to the need identified by the Legislature and presumed that the precise allocation of costs was tied to that need based on facts and data. Notably, the Legislature requires that the Health and Human Services Commission (HHSC) establish an advisory committee to study “rehabilitation, including persons with brain injuries.” TEX. GOV’T CODE § 531.012(a)(6). The Brain Injury Advisory Council issues its report to the HHSC, the Governor, and

⁵ During session, committees are required to meet regularly and, when not in session, when necessary. TEX. GOV’T CODE § 301.014.

Legislature.⁶ See TEX. GOV'T CODE § 531.012(d)(2) (written report). In 2013,⁷ 11.7% (2,748)⁸ of traumatic brain injuries were caused by the victim being struck by something or against something, with 2.07% of those resulting in death.⁹ That statistic includes traumatic brain injury due to criminal conduct.¹⁰ The report also states that the lifetime cost of care for a person suffering from a traumatic brain injury is between \$600,000 and \$1,875,000.¹¹ Of the \$283,047,000 collected in court costs by the Comptroller in 2013, only .0002% could cover the lowest estimated cost of a

⁶ The Texas Brain Injury Advisory Council 2018 Report Presented to the Governor of Texas, the Lieutenant Governor, the Speakers of the Texas House of Representatives, the Texas Legislature and the Executive Commissioner of the Health and Human Services Commission (hereinafter “2018 Brain Injury Report”), *available at* <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2018/texas-brain-injury-advisory-council-report-dec-2018.pdf>.

⁷ The State Prosecuting Attorney has chosen 2013 because that is the year used by the Texas Brain Injury Advisory Council in its 2016 and 2018 reports.

⁸ The same number was reported in the Council’s 2016 report. See The Texas Brain Injury Advisory Council 2016 Report, at 4 (Dec. 2016) (hereinafter “2016 Brain Injury Report”), *available at* <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2016/texas-brain-injury-advisory-council-report-dec2016.pdf>.

⁹ 2018 Brain Injury Report, at 7-8; 2016 Brain Injury Report, at 5.

¹⁰ The HHSC lists “[v]iolence, such as domestic or gang violence, assault or shaken baby syndrome” as common causes of traumatic brain injury. <https://hhs.texas.gov/services/disability/acquired-brain-injury/learn-about-acquired-brain-injuries>.

¹¹ 2018 Brain Injury Report, at 10.

single person over a lifetime.¹² After considering the type of evidence known to the Legislature in setting the fee, it is clear that it dedicated a minute portion of the consolidated court costs and fees to fulfill a much larger existing, proven—and forever evolving—societal need. This determination should be unassailable. *See W. Orange-Cove Consol. I.S.D. v. Alanis*, 107 S.W.3d 558, 582 (Tex. 2003) (“it is outside the scope of judicial authority to review the Legislature’s policy choices in determining what constitutes an adequate education, . . .”). Broadening the scope of understanding to match that of the Legislature in enacting this fee establishes that it does not actually suffer from any real lack of direction to a criminal justice purpose.

¹² A History of State Taxes and Fees in Texas, 1972 to 2018, at 89, *available at* <https://comptroller.texas.gov/transparency/revenue/sources.php>.

2. The Governor and Legislature Have Budget Power, Not the Courts.

The State's budget is controlled by the Governor and the Legislature. The Governor is chief budget officer and prepares, with the Legislative Budget Board (LBB),¹³ a uniform budget. TEX. GOV'T CODE §§ 401.041, 401.042(a)-(b). Part of the budget process is based on the strategic plans submitted by executive-branch agencies, in even numbered years, which include, among other things: (1) the mission and goals; (2) output and outcome measures; (3) identity of those served; (3) an analysis of resources; and, (4) expected changes in services. TEX. GOV'T CODE §§ 2056.001-002. Additionally, all state agencies must prepare a Legislative Appropriations Request (LAR) to present to the LBB and Governor.¹⁴ The Governor may hold public hearings and may require state agency heads to testify about an agency's request. TEX. GOV'T CODE § 401.403. The Governor may also hold, with the LBB, joint public hearings on the biennial appropriation budget. TEX. GOV'T CODE § 401.044. Thus, the budget is compiled by the Governor through information

¹³ See TEX. GOV'T CODE § 316.002 (defining duties of the LBB).

¹⁴ See, e.g., 2020-2021 Legislative Appropriations Request, Detailed Instructions for Agencies for the Biennium Beginning September 2019, *available at* <http://www.lbb.state.tx.us/documents/instructions/lar/legislative%20appropriations%20detailed%20instructions%20for%20state%20agencies,%20institutions%20and%20agencies%20of%20higher%20education.pdf>; Governor's June 22, 2018 Directive for LAR Submission, *available at* http://www.lbb.state.tx.us/documents/instructions/lar/lar_policy_letter.pdf.

submitted in budget estimate forms and information obtained from “public hearings, from inspections, and other sources.” TEX. GOV’T CODE § 401.0445. A committee comprised of the Governor, Lieutenant Governor, Speaker of the House, and the Comptroller sets the limit on proposed appropriations. TEX. GOV’T CODE § 316.005. The Governor then presents the budget to the Legislature before his state of the State address. TEX. CONST. Art. IV, § 9; TEX. GOV’T CODE §§ 316.009, 401.046.

Once the budget is submitted to the Legislature, it is formally introduced to the Senate and the House. TEX. GOV’T CODE §§ 316.021-022. The Senate Finance and House Appropriations Committees hold public hearings, where the head of any agency may appear to discuss the agency’s appropriations request.¹⁵ TEX. GOV’T CODE § 316.022. The limit on appropriations may be raised, by resolution, if the Legislature identifies an emergency requiring funding. TEX. CONST. Art. VIII, § 22; TEX. GOV’T CODE § 316.008. But, the one non-negotiable requirement is that the Legislature enact a balanced budget for each biennium. TEX. CONST. Art. III, § 49a(b).

¹⁵ The Senate and House can hold budget hearings without waiting for the Governor’s submission. TEX. GOV’T CODE § 316.022(b). The budget from the Senate and House must ultimately be reconciled in a conference committee comprised of both houses. *See* 85th Legislature Texas Senate Rule 12.04 (Jan. 11, 2017), *available at* https://senate.texas.gov/_assets/pdf/SenateRules85.pdf; 86th Legislature Texas House Rule 13, § 9 (Jan. 2019), *available at* https://house.texas.gov/_media/pdf/hrrules86.1.pdf.

Finally, the Governor has the authority to veto legislation, including the budget. *Ex parte Perry*, 483 S.W.3d 884, 900 (Tex. Crim. App. 2016) (citing TEX. CONST. Art. IV, § 14). And with appropriations, the Governor may issue a line-item veto, which can only be overridden by a two-thirds vote from both the Senate and House. TEX. CONST. Art. IV, § 14; *see Jessen Associates, Inc., v. Bullock*, 531 S.W.2d 593, 596, 599-600 (Tex. 1975) (Governor can only line-item funds set aside for a specified purpose). Finally, during the biennium, the Governor can shift funding in the budget when necessary. TEX. GOV'T CODE §§ 317.002-003 (Governor's ability to make proposals concerning appropriated funds).

Again, taking into account the complex budget process, it is indisputable that the funds appropriated are grounded in firm fact-based requirements and needs identified by the Governor and Legislature. Criminal-justice-related state and local multifaceted requirements and needs are among the many matters of public affairs addressed in the budget. When courts second-guess the well-informed budget determinations and accounting protocols of the other two branches, they violate separation of powers. As shown below, nothing exemplifies this more than specific elements of the State's budget.

3. General Revenue Funds Support Criminal Justice Entities and Resources.

General-revenue-dedicated funds are a good place to start. The court costs and fees collected by the Comptroller include those dedicated to specific accounts that are expressly criminal-justice-related.¹⁶ Even before *Salinas*, those accounts held the majority of those costs and fees.¹⁷

Dedicated Accounts	Estimated Revenue FY 2016-17 ¹⁸
Commission on Law Enforcement 0116	\$18,193,000
Criminal Justice Planning 0421	\$44,972,000
Crime Stoppers Assistance 5012	\$924,000
Breath Alcohol Testing 5013	\$1,973,000
Bill Blackwood Law Enforcement Management Institute 0581	\$7,768,000
Center for Study and Prevention of Juvenile Crime and Delinquency 5029	\$4,400,000
Fair Defense 5073	\$52,400,000
Correctional Management Institute and Criminal Justice Center 5083	\$4,048,000

¹⁶ A History of State Taxes and Fees in Texas, 1972 to 2018, at 88.

¹⁷ Comptroller's Report on Use of General Revenue Dedicated Accounts, 84th Legislature 2015, *available at* <https://comptroller.texas.gov/transparency/reports/use-of-general-revenue-dedicated/>.

¹⁸ *Id.* at 1-3.

EMS, Trauma Facilities, Trauma Care Systems 5108	\$8,000,000
Emergency Radio Infrastructure 5153	\$614,000
Total	\$143,292,000

In 2016, the Comptroller reported \$265,054,000 collected from fees and costs.¹⁹ In 2017, it was \$253,705,000.²⁰ Only the remaining funding (\$265,054,000 - \$143,292,000 = \$121,762,000 and \$253,705,000 - \$143,292,000 = \$110,413,000) could have been used towards the other general-revenue-supported criminal justice obligations as discussed below.

Undedicated general revenue is highly important as well. The lion's share of governmental expenses are paid for through the undedicated general revenue fund.²¹ This is true with respect to many of the state offices and agencies, as well as local entities, that are an integral part of the criminal justice system. And a dollar-for-dollar comparison of court costs and fees collected in 2017 and 2018 (\$253,705,000 and \$251,386,000, respectively) with criminal-justice-related funding establishes that

¹⁹ A History of State Taxes and Fees in Texas, 1972 to 2018, at 89.

²⁰ *Id.*

²¹ The SPA is referring to the 2018-2019 Biennium Budget (hereinafter Budget), at ix, *available at* http://www.lbb.state.tx.us/Documents/GAA/General_Appropriations_Act_2018-2019.pdf.

the money used to support criminal justice far exceeds the amount collected.

Consider the following:

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Attorney General	Crime Victims' Compensation AG Law Enforcement Account Sexual Assault Program ²²	\$220,056,253 \$225,603,213	Criminal Prosecutions Division ²³ Criminal Appeals Division ²⁴ Juvenile Crime Intervention ²⁵

²² Budget, at I-3.

²³

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-prosecutions>. This includes the creation of the Human Trafficking Taskforce under TEX. GOV'T CODE § 402.035 and prosecution of election law violations under TEX. ELEC. CODE § 273.021.

²⁴

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/criminal-appeals>.

²⁵

<https://www.texasattorneygeneral.gov/divisions/criminal-justice/gangs-juvenile-justice>.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Governor	Criminal Justice Planning Sexual Assault Program Crime Stoppers Assistance Drug Court Prostitution Prevention Programs Child Sex Trafficking Unit ²⁶	\$195,423,008 \$57,166,771	Anti-Gang Programs ²⁷ Behavioral Health ²⁸ Bullet-Resistant Vests ²⁹ Criminal Justice ³⁰

²⁶ Budget, at I-52-53, I-58, I-59.

²⁷ Budget, at I-58.

²⁸ Budget, at I-59.

²⁹ *Id.*

³⁰ There are over twenty criminal justice programs in the Governor's Office.
<https://gov.texas.gov/organization/cjd/programs>.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Court of Criminal Appeals	Judicial and Court Personnel Training Fund ³¹	\$6,535,680 \$6,285,681	State court of last resort for all criminal cases ³²
State Prosecuting Attorney	N/A	\$405,627 \$405,627	Represents the State before the Court of Criminal Appeals ³³

³¹ Budget, at IV-3.

³² TEX. CONST. Art. V, § 5.

³³ TEX. GOV'T CODE § 42.001.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Professional Prosecutor Salaries³⁴	N/A	\$100,236,099 \$100,644,101	District and Criminal District Attorney Compensation ³⁵ (\$741,727) Professional Prosecutor Compensation ³⁶ (\$21,797,968) Felony Prosecutor Compensation ³⁷ (\$340,535)
Special Prosecution Unit³⁸	N/A	\$3,782,646 \$3,630,646	Criminal Division \$1,926,933 \$1,847,551

³⁴ This is included in the Comptroller's Judiciary Section. Budget, at IV-33-34.

³⁵ TEX. GOV'T CODE § 41.013.

³⁶ TEX. GOV'T CODE §§ 46.002-005.

³⁷ TEX. GOV'T CODE §§ 44.220, 45.175, 45.280.

³⁸ Budget, at IV-36.

Agency	Dedicated Criminal Justice General Revenue Items	Total General Revenue, 2018 & 2019, respectively	Criminal Justice Purpose
Department of Criminal Justice	N/A	\$3,073,562,787 \$3,097,832,771	Provide Prison Diversions ³⁹ (\$248,317,931; 246,301,993) Incarcerate Felons ⁴⁰ (\$2,725,349,173; \$2,737,468,689) Operate Parole System ⁴¹ (\$183,859,324; \$183,913,308)
Department of Public Safety	Motorcycle Education Sexual Assault Program Breath Alcohol Testing Emergency Radio Infrastructure	\$937,112,823 \$906,203,652	Combat Crime and Terrorism ⁴² (\$148,092,365; \$148,071,465) Enhance Public Safety ⁴³ (\$274,841,043; \$261,561,140)

³⁹ Budget, at V-6.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Budget, at V-46.

⁴³ *Id.*

Ancillary costs should also be considered. The entities that are an integral part of the criminal justice system incur costs to a variety of other state agencies that provide an administrative or support role. For instance, the Office of Court Administration supports the Office of State Prosecuting Attorney with information technology. Budget, at IV-26. And all state agencies receive services from the Employee Retirement System of Texas.⁴⁴ See Budget, at I-32-37 (ERS Budget). Likewise, the Comptroller provides services to all state agencies. See Budget, at I-16-28. Numerous ancillary costs are incurred by those directly involved in the criminal justice system. There is no reason that these should not be taken into account. They are a necessity.

So, how is something designated as a cost or fee transformed into an impermissible tax when the Legislature has the power to determine what costs and fees are appropriate? The answer is they do not. And does the deposit of costs and fees in the general fund really make the statutory court costs and fees illegitimate? No. The State's budget reflects the criminal justice requirements and needs of Texas. And these change with each biennium. From biennium to biennium, the Governor and Legislature must have flexibility when it comes to making these *ad hoc*

⁴⁴ See <https://ers.texas.gov/About-ERS> (explaining that the role of ERS is to manage the benefits of employees and retirees).

determinations. As proven above, deposit in the general fund does not mean that the funds are divorced from serving our criminal justice system. Instead, it enables the large and diverse system to function.

Beyond all doubt, the dedicated and undedicated state funding used to support the criminal justice system surpasses the court costs and fees collected. Unless and until the costs and fees collected exceed the State's criminal justice operating costs, there is no actual taxation conversion and violation of separation of powers.

4. Conclusion: Courts Have No Authority Over Court Costs and Fees and Criminal Justice Appropriations.

The judicial demand that the Comptroller “show it the money” unconstitutionally infringes on the Legislature's constitutional power to assign court costs and fees and the Legislative and Executive branches' power over the State's budget. If something is designated as a cost or fee, this Court does not have the authority, when faced with a facial attack, to declare it a tax. To do so is akin to striking down a penal statute simply because the Court disagrees with the Legislature making certain conduct an offense at all. *See Rhine*, 297 S.W.3d at 306 (the Legislature has the exclusive domain over fixing penalties for criminal offenses). Nor can this Court substitute its judgment as to what qualifies as a “legitimate criminal justice purpose,” *Peraza*, 467 S.W.3d at 517-18, when the Governor and Legislature have expressly found otherwise. *See Cornet v. State*, 359 S.W.3d 217,

221 (Tex. Crim. App. 2012) (“We must take care, when searching beyond the text to find meaning, that we do not substitute our judgment for that of the Legislature in giving effect to a statutory provision.”). The branch that enacts all general laws has a better, and certainly more holistic, understanding of how to fund the state and local governments so our criminal justice demands are met. Contrary to *Salinas*, the mere qualification that the funds are deposited into the general revenue is not the proper litmus test. See *Texas Office of Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393, 427 (5th Cir. 1999) (“how the government classifies a program for accounting purposes does not resolve whether the funds are used for a specific program or for general revenues.”).

This Court’s supervisory authority should not be implicated in these circumstances because no improper delegation of authority has occurred. Therefore, the State Prosecuting Attorney asks this Court to overrule *Ex parte Carson*, *Peraza*, and *Salinas*. They were wrongly decided at the outset and run afoul of the powers granted to the other co-equal branches. See *Bawcom v. State*, 78 S.W.3d 360, 363 (Tex. Crim. App. 2002) (overruling precedent is appropriate when it was wrong at its inception); *Paulson v. State*, 28 S.W.3d 570, 571 (Tex. Crim. App. 2000) (overruling precedent is appropriate when it proves unworkable).

PRAYER FOR RELIEF

The State Prosecuting Attorney asks this Court to overrule *Ex parte Carson*, *Peraza*, and *Salinas*. Court costs and fees are within the purview of the Legislature, and criminal justice spending is determined by the Governor and Legislature.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,538 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

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State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State Prosecuting Attorney's Post-Submission Amicus Brief has been served on February 28, 2019, *via* email or certified electronic service provider to:

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